NO. 49162-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

DOUGLAS KIRBY,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable Gary R. Tabor, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Prosecutorial argument that misstated the burden of proof beyond a reasonable doubt violated Mr. Kirby's right to a fair trial.

2. Counsel rendered constitutionally ineffective assistance in failing to object to the prosecutor's misstatement of the burden of proof during closing argument.

3. The sentencing court exceeded its statutory authority in imposing an improper community custody condition requiring Mr. Kirby to submit to plethysmograph examinations at the direction of his community corrections officer.

4. The judgment and sentence contains scrivener's errors on the date of the crime and the maximum term for the crime.

5. If the state substantially prevails on appeal, any request for appellate costs should be denied.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Prosecutors have a duty not to misstate the law, and the law pertaining to the burden of proof beyond a reasonable doubt is particularly important, the bedrock of our criminal justice system. The prosecutor here argued the jurors need only have a mere belief in the

evidence to find Mr. Kirby guilty. Does this distortion of the burden of proof require reversal of Mr. Kirby's convictions?

2. Effective assistance of counsel is required to ensure a fair trial. Here, counsel failed to object to prosecutorial argument that undermined the burden of proof beyond a reasonable doubt. Must Mr. Kirby's convictions be reversed for ineffective assistance of counsel?

3. Whether the sentencing court exceeded its statutory authority by imposing an improper community custody condition requiring Mr. Kirby submit to plethysmograph examinations at the direction of his community corrections officer?

4. Whether Mr. Kirby's entitlement to a judgment and sentence free of scrivener's errors requires his case be remanded to correct the incorrect "date of crime" for each of his convictions?

5. Whether Mr. Kirby must pay appellate costs if he does not substantially prevail on appeal and the state requests costs?

C. STATEMENT OF THE CASE

1. Procedural History

The state charged Mr. Kirby by its first amended information with two counts of rape of a child in the first degree and two counts of child

molestation in the first degree. CP 6-7. The amended information provided incident dates for each count as March 5, 2008 through May 22, 2009. CP 6-7. The information listed JW as the victim of each count. CP 6-8.

A jury found Mr. Kirby guilty as charged. CP 8-11. The to-convict instructions listed the same incident dates as in the amended information. Supplemental Designation of Clerk's Papers, Court's Instructions to the Jury (Instructions 9, 12, 15, 17).

At sentencing, the court imposed 310 months to life sentences on both rape convictions and 198 months to life on both molestation convictions. CP 17. The term of community custody imposed for each count was any period of time Mr. Kirby was not confined. CP 17.

The court imposed conditions of community custody to include that Mr. Kirby submit to polygraph and plethysmograph examinations as directed by his community corrections officer. CP 24. Mr. Kirby did not object to the condition. RP4[1] 653-65.

The judgment and sentence lists the date of each crime as January 1, 2008. CP 12.

Mr. Kirby appeals all portions of his judgment and sentence. CP 29.

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[1] There are 4 volumes of verbatim report of proceedings (RP) designated herein as RP1, RP2, RP3, and RP4. Two separate hearings were transcribed also and reference to those are RP 5/19/14 and RP 5/4/16.

2. Trial Evidence

In 2008, Mr. Kirby dated Demetria Wesley. RP2 224. Ms. Wesley has four children. RP 2 225. Her son, JW, was born on October 22, 1997. RP2 353. Ms. Wesley claimed she and Mr. Kirby lived together for several months in late 2008 through mid-2009. RP2 224-25. Mr. Kirby denied living with Ms. Wesley. RP3 507-08. He agreed they dated and he spent the night at her place a few times. From his perspective, the relationship was primarily sexual. RP3 509. Because they dated, he knew her children but had spent little time with them, and had no parental or disciplinary role with them. RP3 508. Mr. Kirby also never touched JW inappropriately. RP3 504-05.

JW went to fifth grade at Madison Elementary School. RP2 355. He acted out at school all the time during the academic year. RP 2 360. As a consequence, he was disciplined frequently at school and was suspended twice. RP3 538, 541-42. It was during this window of time where Mr. Kirby ostensibly lived with Ms. Wesley.

JW, age 18, and a senior in high school, testified about six instances of unwanted physical contact with Mr. Kirby. RP2 353, 369-99; RP3 405-34. The instances involved acts of kissing, unwanted genital touching, and oral-genital contact. Id.

Per JW, he told no one about the contact until his freshman year in high school. He shared having been molested with his new girlfriend, MS, via text. RP2 297, 365. MS's parents routinely read her texts. MS's mother read the text. RP2 299-300. She told MS's father about the text. RP2 310. MS's father is a high school teacher and coach. RP2 307, 311. MS and her mother talked to JW about the allegations and told JW's parents. RP2 301-05. JW talked to his parents who, in turn, called the police. RP2 206-11, 249, 253. After additional investigation, the state filed charges against Mr. Kirby. RP 258, 263; CP 4-5.

Mr. Kirby defended against JW's allegations by discrediting his testimony in two ways. First, he impeached JW's testimony about having been suspended from school many times in fifth grade. RP2 360, 362. The reality was JW was only suspended twice. RP3 538, 541-42. Second, Mr. Kirby presented testimony from his sister and several women he dated and lived with since his 2008 release from prison to prove he never lived with Ms. Wesley. RP3 466-72, 480-83, 490-93, 505-08.

In closing argument, the state equated proof beyond a reasonable doubt to a mere "belief" in "everything on the checklists" (i.e., the to-convict instructions). RP4 635, 639. Defense counsel failed to object to the argument. RP4 635-39.

D. ARGUMENT

1. The prosecutor's argument minimizing the burden of proof denied Mr. Kirby a fair trial.

The presumption of innocence and the corresponding burden of proof beyond a reasonable doubt forms the bedrock of our criminal justice system. *State v. Bennett*, 161 Wn.2d 303, 315, 165 P.3d 1241 (2007). When a prosecutor misstates the law pertaining to the burden of proof, there is a grave risk the jury will be misled and the accused deprived of his or her constitutional due process right to a fair trial. *State v. Warren*, 165 Wn.2d 17, 27-28, 195 P.3d 940 (2008); *State v. Davenport*, 100 Wn.2d 757, 763, 675 P.2d 1213 (1984); *State v. Fleming*, 83 Wn. App. 209, 213-14, 921 P.2d 1076 (1996).

A prosecutor's misconduct is reversible error when the argument was improper and, under the circumstances, prejudice resulted. *In re Pers. Restraint of Glasmann*, 175 Wn.2d 696, 704, 286 P.3d 673 (2012). The mere failure to object is not waiver when no instruction could have cured the prejudice and the prejudice had a substantial likelihood of affecting the verdict. *State v. Pinson*, 183 Wn. App. 411, 416, 333 P.3d 528 (2014) (citing *State v. Emery*, 174 Wn.2d 741, 760–61, 278 P.3d 653 (2012)).

Here, the prosecutor committed prejudicial misconduct when he argued, "[B]ut what it comes down to is do you believe that everything on those checklists that we talked about earlier happened, and if you have that belief, I would submit to you you are convinced beyond a reasonable doubt." 4RP at 639. (By "checklists," the prosecutor is referring to the to-convict" instructions.) RP4 635, 639. To compound the problem, he also suggested the reasonable doubt standard was something detached from the "abiding belief" also required under the pattern instruction: "Abiding belief is the basis for a reasonable doubt . . . but what it comes down to is do you believe . . . and if you have that belief . . . you are convinced beyond a reasonable doubt." 4RP 639. This argument distorted and minimized the burden of proof and requires reversal of Mr. Kirby's conviction.

a. The prosecutor distorted and diminished the burden of proof by a mere belief in the evidence equated to proof beyond a reasonable doubt.

"Statements made by the prosecutor or defense to the jury must be confined to the law as set forth in the instructions given by the court." *Davenport*, 100 Wn.2d at 760; *State v. Estill*, 80 Wn.2d 196, 199, 492 P.2d 1037 (1972). Specifically, a prosecutor may not attempt to shift or diminish the burden of proof beyond a reasonable doubt in closing argument. *Warren*, 165 Wn.2d at 26-27; *State v. Cleveland*, 58 Wn. App. 634, 647, 794

P.2d 546 (1990). The prosecutor's argument that reasonable doubt is overcome by a simple belief in the evidence is an incorrect statement of law that undermined the beyond a reasonable doubt burden of proof. A simple belief in the evidence is equivalent to the lower civil standard of a preponderance of the evidence. The preponderance of the evidence standard requires only that the evidence establish the proposition at issue is more probably true than not true. *In re Welfare of Sego*, 82 Wn.2d 736, 739 n. 2, 513 P.2d 831 (1973).

> Instruction 3, informed the jury as to the burden.
>
> The defendant has entered a plea of not guilty to the charges. That plea puts in issue every element of the crimes charged. The State is the plaintiff and has the burden of proving each element of each crime beyond a reasonable doubt.
>
> A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberation you find it has been overcome by the evidence beyond a reasonable doubt. A reasonable doubt is one for which a reason exits and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. If, after such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

Supp DCP, Jury Instruction 4.

It is certainly true that jurors need not be able to articulate a specific reason to doubt in order to find reasonable doubt and acquit.

Emery, 174 Wn.2d at 759-60. But this does not mean that reasons to doubt may be disregarded when they arise. While the jury need not be able to point to a reason for doubt in order to acquit, if the jury identifies such a reason, it has a duty to acquit. The prosecutor's argument was improper because it invited the jury to set aside valid reasons to doubt. In closing argument, Mr. Kirby pointed out numerous reasons to doubt the accuracy of the state's evidence. RP3 598-99; RP4 604-28.

The prosecutor also argued that, instead of a reason to doubt, "Abiding belief is the basis for a reasonable doubt." RP4 639. Although technically a correct statement of the law if taken in isolation, the prosecutor's abiding belief argument compounded the misleading nature of the argument about reasonable doubt. This aspect of the argument encouraged the jury to ignore reasonable doubt and focus only on "abiding belief in the truth of the charges."

The truth is not the primary question before the jury. The "single, crucial, hard-core question," in a criminal case "should be framed by reference not to a general search for truth, but to the reasonable doubt standard." *United States v. Shamsideen*, 511 F.3d 340, 347 (2d Cir. 2008). The reasonable doubt standard has long been recognized "as the best means to achieve the ultimate goals of truth and justice." *Id.* By describing

reasonable doubt in such a way as to render it meaningless, and urging the jury instead to focus on its "abiding belief in the truth of the charges," the prosecutor steered the jury away from what should be its primary concern: reasonable doubt.

The prosecutor's rebuttal argument diminished and distorted the meaning of proof beyond a reasonable doubt, thereby diminishing the state's burden and undermining the presumption of innocence. This was improper. *See, e.g., Warren,* 165 Wn.2d at 27 (prosecutorial argument that undermines the burden of proof is "simply improper").

b. Reversal is required because the improper argument undermined the jury's understanding of the burden of proof and likely affected the verdict.

Flagrant and ill-intentioned argument incurable by instruction cannot be waived by the mere failure to object. *Pinson*, 183 Wn.2d. App. at 419 (citing *Emery*, 174 Wn.2d at 760-61). Misstatements of law pertaining to the burden of proof cannot be easily dismissed. *Fleming*, 83 Wn. App. at 213-14 (argument that jury could only acquit if it found a witness was lying or mistaken misstated the state's burden of proof, was "flagrant and ill intentioned," and required a new trial despite lack of objection).

A prosecutor's disregard of a well-established rule of law, such as the burden of proof is flagrant and ill-intentioned misconduct. *Fleming*, 83 Wn. App. at 214. Because the burden of proof beyond a reasonable doubt is so fundamental and so difficult to correctly explain, Washington's courts have repeatedly warned against misguided attempts to add further explanation to the pattern instruction. *Emery*, 174 Wn.2d at 759-60 (argument that reasonable doubt requires filling in the blank with a reason for doubt is improper); *Warren*, 165 Wn.2d at 26-27 (argument that reasonable doubt does not mean to give the defendant the benefit of the doubt undermined presumption of innocence); *Bennett*, 161 Wn.2d at 317-18 (recognizing the temptation to expand upon the pattern instruction and exercising supervisory authority to require use of the pattern instruction). Beneath the backdrop of these repeated warnings, the prosecutor's argument was flagrant misconduct.

The written instructions did not cure the prejudice. Although jurors were instructed to disregard any argument not supported by the written instructions,[2] the instructions also encouraged jurors to consider the lawyers' remarks when applying the law. Supp. DCP, Court's Instructions

[2] Supp. DCP, Court's Instructions to the Jury (Instruction 1) ("You must disregard any remark, statement, or argument that is not supported by . . . the law in my instructions.").

to the Jury (Instruction 1) ("The lawyers' remarks, statements, and arguments are intended to help you understand the evidence and apply the law.").

Regardless of any instruction, jurors would be particularly tempted to follow the prosecutor's approach of ignoring reasonable doubt to focus on abiding belief – or even a simple "belief" - because the standard reasonable doubt instructions are not a model of clarity. *Bennett*, 161 Wn.2d at 317 (recognizing that even under the pattern instructions, the concept of reasonable doubt seems difficult to define and explain, making it tempting to expand the definition). Focusing solely on belief provides a simple (albeit mistaken) way for jurors to decide guilt or innocence.

This case demonstrates the prejudice absent in *Warren*. There, the prosecutor argued reasonable doubt did not mean the jury should give the defendant the benefit of the doubt. *Warren*, 165 Wn.2d at 27. The court declared that, had there not been an effective and thorough curative instruction, it "would not hesitate to conclude that such a remarkable misstatement of the law by a prosecutor constitutes reversible error." *Id.* at 28. No such instruction was given, and Mr. Kirby's convictions should be reversed.

2. Counsel was ineffective in failing to object when the prosecutor undermined the burden of proof during rebuttal closing argument.

If this court should conclude the full potency and protection of the burden of proof could have been restored by a curative instruction, then counsel was ineffective in failing to request such an instruction. The Sixth Amendment and Wash. Const. art. I, § 22 of Washington's Constitution guarantee the right to effective assistance of counsel for the defense of accused persons. "A claim of ineffective assistance of counsel may be considered for the first time on appeal as an issue of constitutional magnitude." *State v. Nichols*, 161 Wn.2d 1, 9, 162 P.3d 1122 (2007).

Defense counsel is constitutionally ineffective where (1) the attorney's performance was unreasonably deficient and (2) the deficiency prejudiced the defendant. *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987) (citing *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). Only legitimate trial strategy or tactics constitute reasonable performance. *State v. Aho*, 137 Wn.2d 736, 745, 975 P.2d 512 (1999). The presumption of competent performance is overcome by demonstrating "the absence of legitimate strategic or tactical reasons supporting the challenged conduct by counsel." *State v. Crawford*, 159 Wn.2d 86, 98, 147 P.3d 1288 (2006). Under the second prong, the court

must reverse if it finds a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Thomas*, 109 Wn.2d at 226 (citing *Strickland*, 466 U.S. at 694). Reversal is required when the attorney's error undermines confidence in the outcome. *Id*.

Failure to preserve error can constitute ineffective assistance and justifies examining the error on appeal. *State v. Ermert*, 94 Wn.2d 839, 848, 621 P.2d 121 (1980); *State v. Allen*, 150 Wn. App. 300, 316-17, 207 P.3d 483 (2009) (addressing ineffective assistance claim where attorney failed to raise same criminal conduct issue during sentencing). Here, reasonably competent counsel would have objected to the blatant misstatement of the burden of proof during the prosecutor's rebuttal closing argument. There is no possible strategic reason for permitting the jury to be misled about the burden of proof beyond a reasonable doubt, the fundamental concept underlying the criminal justice system.

The burden of proof beyond a reasonable doubt is essential to the fair trial required by constitutional due process. *State v. McHenry*, 88 Wn.2d 211, 214, 558 P.2d 188 (1977) (describing failure to instruct on burden of proof as "grievous constitutional failure" and citing *In re*

Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970)). Because the prosecutor so flagrantly misstated this crucial aspect of the jury's role, the court would likely have given a curative instruction if one had been requested. However, without an instruction, the jury was likely operating under a misunderstanding about the nature and significance of reasonable doubt, and confidence in the outcome is undermined.

In light of the prosecutor's misstatements, it is far from certain whether the jury understood the burden of proof, and the fairness of Mr. Kirby's trial is in doubt. If this court finds the error waived by counsel's failure to object, counsel was ineffective in failing to request a curative instruction to ensure his client received a fair trial.

3. The sentencing court erred in ordering an overly broad plethysmograph condition of community custody.

Sentencing courts do not have unfettered discretion in fashioning conditions of community custody. *State v. Kolsenik,* 146 Wn. App. 790, 806-07, 192 P.3d 937 (2008). Instead, a sentencing court must order only those sentencing conditions authorized by the statute. *See In re Carle*, 93 Wn.2d 31, 33, 604 P.2d 1293 (1980).

An illegal or erroneous condition, that issue may be raised for the first time on appeal. *State v. Bahl*, 164 Wn.2d 739, 744-46, 193 P.3d 678 (2008). A challenge to such a condition can be made before the

defendant has served community custody time, because a "preenforcement" challenge is proper on appeal if the challenge raises primarily a legal question and no further factual development is required. *Id*.

Sentencing conditions are reviewed for abuse of discretion and reversed only if the decision is manifestly unreasonable or based on untenable grounds. *State v. Valencia*, 169 Wn.2d 782, 791–92, 239 P.3d 1059 (2010); *State v. Johnson*, 184 Wn. App. 777, 779, 340 P.3d 230 (2014). Because courts have no inherent authority to craft any sentencing condition they choose, ordering a condition not authorized by statute is acting outside the court's authority, and relief should be granted. *Kolesnik*, 146 Wn. App. at 806.

Condition 21 requires Mr. Kirby to "[s]ubmit to polygraph and plethysmograph testing upon direction of your CCO" (community corrections officer). CP 24. The *Land* court noted, "[p]lethysmograph testing is extremely intrusive." *State v. Land*, 172 Wn. App. 593, 295 P.3d 782 (2013). Under the sentencing statutes, it can be ordered only if the person ordering it is a qualified treatment provider and it is part of crime-related treatment. *See State v. Castro*, 141 Wn. App. 485, 494, 170 P.3d 78 (2007). The court further held it is improper to use such testing "as a routine monitoring tool subject only to the discretion of a community corrections officer." *Land*, 172 Wn. App. at 605. Requiring a defendant to submit to plethysmograph testing "at the discretion of a community

corrections officer" violated the "constitutional right to be free from bodily intrusions." *Id*. *Land* struck down a condition very similar to the condition here, requiring Land to participate in urinalysis, breathalyzer, polygraph and plethysmograph testing at the discretion of the community corrections officer. *Id*.

Here, Condition 21 exceeds permissible authority because it requires Mr. Kirby "[s]ubmit to polygraph and/or plethysmograph testing upon direction of your CCO." CP 24. The condition must be limited to a requirement for submission to such tests when asked by a treatment provider, not at the behest of the CCO. The CCO's scope of authority is limited to ordering plethysmograph testing for the purpose of sexual deviancy treatment and not for monitoring purposes. *Johnson*, 184 Wn.2d App. at 781.

On remand, Condition 21 should be redrafted to reflect the appropriate limitations.

4. The trial court should correct the judgment and sentence to reflect the correct date of crime for each conviction.

Mr. Kirby's judgment and sentence contains four scrivener's errors. All require correction.

Section 2.1 incorrectly lists the date of each crime as January 1, 2008. RP 12. The correct dates are March 5, 2008 to May 22, 2009, as specified in the amended information under which he was tried and the

to-convict jury instructions. CP 6-7 (amended information); Supp. DCP, Court's Instructions to the Jury (Instructions 9, 12, 15, 17).

This court should remand Mr. Kirby's case to correct the judgment and sentence. *State v. Naillieux*, 158 Wn. App. 630, 646, 241 P.3d 1280 (2010) (remand appropriate to correct scrivener's error in judgment and sentence erroneously stating defendant stipulated to an exceptional sentence); *State v. Moten*, 95 Wn. App. 927, 929, 976 P.2d 1286 (1999) (remand appropriate to correct scrivener's error referring to wrong statute on judgment and sentence form.); *Bahl*, 164 Wn.2d at 744 (illegal or erroneous sentences may be challenged for the first time on appeal).

5. If the state substantially prevails on appeal, any request for appellate costs should be denied.

If Mr. Kirby does not substantially prevail on appeal, he requests that no costs of appeal be authorized under Title 14 of the Rules of Appellate Procedure. The Court of Appeals has discretion to deny a cost bill even where the state is the substantially prevailing party on appeal. *State v. Sinclair*, 192 Wn. App. 380, 391, 367 P.3d 612, *review denied*, 185 Wn.2d 1034 (2016); RCW 10.73.160(1) (the "court of appeals . . . may require an adult . . . to pay appellate costs."); *State v. Grant*, 196 Wn. App. 644, 385 P.3d 184 (2016). Imposing costs against indigent defendants

raises problems well documented in *Blazina*: "increased difficulty in reentering society, the doubtful recoupment of money by the government, and inequities in administration." *State v. Blazina*, 182 Wn.2d 827, 835, 344 P.3d 680 (2015). Sinclair recognized the concerns expressed in *Blazina* applied to appellate costs and it is appropriate for appellate courts to be mindful of them in exercising discretion. *Sinclair*, 192 Wn. App. at 391.

The trial court found Mr. Kirby qualified for indigent defense at trial and on appeal. CP 3 (trial); CP 27-28 (appeal). Importantly, there is a presumption of continued indigency throughout the review process. *Sinclair*, 192 Wn. App. at 393; RAP 15.2(f). As in *Sinclair*, there is no trial court order finding Mr. Kirby's financial condition has improved or is likely to improve. *Sinclair*, 192 Wn. App. at 393.

Mr. Kirby is serving four concurrent sentences. Two required he serve, at a minimum, 310 months, and two require he serve, at a minimum, 198 months. All impose maximum sentence of life in prison. CP 17. Given the serious concerns recognized in *Blazina* and *Sinclair*, this court should soundly exercise it discretion by denying the state's request for appellate costs in this appeal involving an indigent appellant.

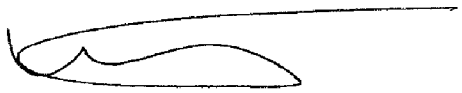
E. CONCLUSION

The prosecutor's misstatement of the burden of proof requires reversal of Mr. Kirby's convictions. Alternatively, defense counsel's failure to object to the misstatement deprived Mr. Kirby effective assistance of counsel and similarly necessitates reversal of the convictions.

If the court does not reverse the convictions, Mr. Kirby's case should be remanded to correct and limit the plethysmograph community custody condition, and correct the date of crimes scrivener's error.

Finally, any request for appeal costs should be denied.

Respectfully submitted January 27, 2017.



LISA E. TABBUT/WSBA 21344
Attorney for Douglas Kirby

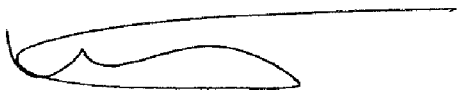
CERTIFICATE OF SERVICE

Lisa E. Tabbut declares:

On today's date, I efiled the Brief of Appellant to (1) Thurston County Prosecutor's Office, at paoappeals@co.thurston.wa.us; (2) the Court of Appeals, Division II; and (3) I mailed it to Douglas Kirby/DOC#766513, Coyote Ridge Corrections Center, PO Box 769, Connell, WA 99326.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed January 27, 2017 in Winthrop, Washington.



Lisa E. Tabbut, WSBA No. 21344
Attorney for Douglas Kirby, Appellant

LISA E TABBUT LAW OFFICE

January 27, 2017 - 6:43 AM

Transmittal Letter

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Case Name: State v. Douglas Kirby
Court of Appeals Case Number: 49162-1

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